



AILA National Office
Suite 300
1331 G Street, NW
Washington, DC 20005

Tel: 202.507.5600
Fax: 202.783.7853

www.aila.org

Jeanne A. Butterfield
Executive Director

Susan D. Quarles
Deputy Director, Finance & Administration

Crystal Williams
Deputy Director, Programs

March 4, 2009

Chief, Regulatory Management Division
U.S. Citizenship and Immigration Services
Department of Homeland Security
111 Massachusetts Avenue, N.W.
Washington, D.C. 20529-2210

**Re: DHS Docket No. USCIS-2008-0001, Documents Acceptable for
Employment Eligibility Verification**

Dear Sir or Madam:

The American Immigration Lawyers Association (“AILA”) submits these comments on the interim rule published at *73 Fed. Reg.* 76505-76517 (“2008 Interim Rule”) on December 17, 2008, which amends part 274a of chapter I of title 8 of the Code of Federal Regulations (“CFR”) 8 CFR §274a.2 concerning verification of identity and employment authorization.

AILA is a voluntary bar association of more than 11,000 attorneys and law professors practicing, researching, and teaching in the field of immigration and nationality law. Our mission includes the advancement of the law pertaining to immigration and nationality and the facilitation of justice in the field. We appreciate the opportunity to comment on the interim final rule and believe that our members’ collective expertise provides experience that makes us particularly well-qualified to offer views that we believe will benefit the public and the government. AILA members regularly advise and represent American companies, U.S. citizens, lawful permanent residents, and foreign nationals in seeking immigration benefits, including lawful admission to the United States, and in complying with U.S. immigration laws and regulations.

AILA is concerned that the interim rule fails to address multiple provisions in the statute with reference to requirements for employment verification further adding to the confusion surrounding completion of the I-9. The rule fails to comprehensively address many issues, and due to the protracted nature of its promulgation leads to further confusion surrounding the I-9 verification process. Furthermore, practitioners and employers are left without adequate guidance and notice regarding how to cope with the new rule’s requirements

for employment verification. AILA provides the following comments in the hope that they will be taken into consideration upon finalization of the rule. AILA specifically addresses the Preamble's invitation to comment on the issue of whether the 2008 Interim Rule's prohibition on the use of expired documents for the Form I-9 verification process should be modified to permit employers to accept List B identity documents that have expired within 90 days (or other limited time period). Finally, AILA strongly urges the agency to postpone the effective date of the rule until it is able to consider all comments and provide practitioners and employers with adequate notice of the revised procedures for employment verification.

I. Background of I-9 Statutory Requirements and Rulemaking Process

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRAIRA") was enacted to amend certain perceived areas of weakness in the Immigration Reform and Control Act of 1986 ("IRCA") that had surfaced in the ten years after the passage of the 1986 amendments.¹ The legislative history of IIRAIRA reflects that its document reduction provision was passed in response to criticism that the large number of acceptable documents was confusing to employers and that IRCA permitted the use of certain documents that were easily counterfeited.² IIRAIRA also established a statutory good faith defense against technical I-9 paperwork violations for employers.

Twelve years after the passage of IIRAIRA, USCIS has published this 2008 Interim Rule, which represents the agency's latest attempt to implement the statute's document reduction mandate. The expectation has been that a reorganized Department of Homeland Security ("DHS") would fulfill its predecessor agency's statutory duty of providing law-abiding employers with a final rulemaking consistent with the requirements of the Administrative Procedure Act ("APA").³ In his 2005 statement to the House Subcommittee on Immigration, Border Security and Claims, Richard Stana, GAO Director, Homeland Security and Justice, testified that:

The Immigration Reform and Control Act (IRCA) of 1986 established an employment eligibility verification process and a sanctions program for fining employers for noncompliance. Few modifications have been made to the verification process and sanctions program since 1986, and immigration experts state that a more reliable verification process and a strengthened worksite enforcement capacity are needed to help deter illegal immigration.⁴

Employers expect that the government will provide them with regulations detailing their responsibilities, compliance standards, up-to-date forms, and contextual guidance for implementation. However, in the twelve year period since the amendment's effective date, USCIS and its predecessor agency have

¹ See Section 412 of IIRAIRA, Pub. L. No. 104-208, 110 Stat. 3009-666 (1996).

² H.R. Rep. No. 104-469, at 404-05 (1996).

³ 5 USC §552(a).

⁴ See *GAO-05-822T, Testimony before the Subcommittee on Immigration, Border Security, and Claims, Committee on the Judiciary, House of Representatives (June 21, 2005)*.

published virtually no final regulations or binding guidance to employers regarding the applicable compliance standards for I-9 verification, despite the government's increase in civil and criminal worksite enforcement against employers.

On September 30, 1997, legacy INS published interim regulations eliminating certain documents from the list of acceptable I-9 documents.⁵ On February 2, 1998, it published a notice of proposed final rulemaking with provisions that reduced the number of acceptable, unexpired documents and provided a proposed new form I-9A.⁶ Significantly, the NPRM expressed appropriate concern for the rulemaking process providing the opportunity for public comment, a Regulatory Flexibility Act analysis, and mentioned the need for further rulemaking on the subjects of the amendment of the parallel employment authorization regulation (8 CFR §274a) and the good faith defense provision of section 411(a) of IIRAIRA.⁷ The preamble to the NPRM identified the good faith defense against technical I-9 paperwork violations for employers as another IIRAIRA statutory provision that required additional rulemaking.⁸ The amendment allows employers ten days after agency notice to effect good faith corrections of paperwork violations before it is considered a violation of the INA.⁹ Although legacy INS published a proposed rule to address this issue,¹⁰ the agency has not promulgated a final rule, thus failing to define key components of the good faith defense, including what is a “technical or procedural violation” and what constitutes “good faith compliance.” The practical effect of this lapse in rulemaking is that employers have not been able to effectively avail themselves of a major statutory compliance standard for over a decade.

In short, since 1998, USCIS/legacy INS have not taken or considered new public comments on key concerns regarding the acceptable documents from Lists A, B and C, the I-9 form, the Section two verification and Section three reverification procedures, and the good faith defense and related antidiscrimination concerns. Instead, the agency has issued sporadic policy guidance that has been revised periodically without notice or a historical record.¹¹ In the interim, Congress and USCIS have created a number of new categories of work authorized individuals – including conditional residents with expired permanent residence cards who have filed petitions to remove conditions (I-751);

⁵ Interim Designation of Acceptable Documents for Employment Verification, 62 *Fed. Reg.* 51001-51006 (September 30, 1997) (*hereinafter* 1997 Interim Rule).

⁶ 63 *Fed. Reg.* 5295, 5304 (Feb. 2, 1998) (*hereinafter* “NPRM”).

⁷ 63 *Fed. Reg.* 5287, 5288 (Feb. 2, 1998).

⁸ IIRAIRA §411(a).

⁹ INA §274A(b), 8 USC §1324a(b).

¹⁰ 63 *Fed. Reg.* 16909 (Apr. 7, 1998).

¹¹ See USCIS Office of Business Liaison, Information Bulletin 102, “The Form I-9 Process in a Nutshell,” which claimed to supplement the 1991 edition of the *Handbook for Employers* and the 1991 edition of Form I-9 (Rebranded in 2005) while incorporating a legal disclaimer.

